Supreme Court, U.S.
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No. 00-1339

In The

Supreme Court of the United States

JESSE LEE BROWN and RONALD J. BERGERON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE STATE OF MINNESOTA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Court have jurisdiction given that the issues presented for review were not raised below (*see* petition 16)?

2. Does the Court have jurisdiction given that the decision below rests on independent and adequate state grounds – the interpretation of Minnesota statutes by the Minnesota Court of Appeals?

3. Does the putative class – whose alleged members did not and will not pay any of the medical costs recouped by the State of Minnesota and whose personal injury claims were not settled in the State's litigation against the tobacco industry – have a property interest or due process right that entitles them to recover payments made by the State of Minnesota on their behalf?

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JURISDICTION

Petitioners invoke 28 U.S.C. § 1257 as their basis for this Court's jurisdiction. Section 1257 does not convey jurisdiction because, as petitioners concede, the generic constitutional claims posed as the federal question required under section 1257 were not raised below. *See* Petition ("Pet.") 16 (admitting that the constitutional issues were "neither framed nor argued" below). With very rare exceptions not applicable here, this Court has "adhered to the rule that in reviewing state court judgments under 28 U.S.C. § 1257 [we] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 85 (1997).

In addition, jurisdiction is lacking because the petitioners sought relief in the Minnesota courts based upon Minnesota state statutes, Petitioners' Appendix ("A.") 101-05, and the Minnesota District Court and Court of Appeals denied those claims for relief on the basis of state law. Thus, the decision for which review is sought rests upon independent and adequate state grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983) (no jurisdiction to review state court opinion resting on state grounds).

STATUTORY PROVISIONS

Relevant statutory provisions not set forth in the petition are reproduced at Respondent's Appendix ("R.A.") 1.

STATEMENT OF THE CASE

The State of Minnesota's Tobacco Litigation

The underlying Minnesota tobacco litigation – the settlement and proceeds of which are at issue in the present petition – was filed by the State of Minnesota (with co-plaintiff Blue Cross and Blue Shield of Minnesota) in state court in 1994. The State's suit was a direct action, not derivative of any personal injury claims of smokers. All of the State's causes of action were asserted under Minnesota law, based upon the tobacco industry's breach of independent duties to the State (and Blue Cross), separate and apart from any duties the tobacco industry owed to injured smokers.[1] The State sued to recover monies that the State paid for smoking-related medical care provided to Medicaid (known as "Medical Assistance" under Minnesota statutes) and General Assistance recipients. The State also sought other monetary relief, including future and punitive damages, restitution for unjust enrichment, disgorgement of profits, funding for smoking cessation programs and civil penalties. Plaintiffs' Second Amended Complaint, State of Minnesota *et al.* v. Philip Morris, Inc., *et al.*

Throughout the litigation, the tobacco industry argued that the State (and Blue Cross) could not maintain

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[1] No individual smokers were parties or intervenors in the action, and the State did not seek damages on behalf of any smokers. Petitioner Brown was merely a paid volunteer for a third-party fact deposition noticed by the tobacco defendants.

a direct action but rather only derivative or subrogation claims, *i.e.*, "standing in the shoes" of injured smokers. The Minnesota Supreme Court put this issue to rest in 1996 by holding that Blue Cross, and by necessary implication the State, had direct causes of action against the tobacco industry. *State v. Philip Morris, Inc., et al.*, 551 N.W.2d 490 (Minn. 1996). The Minnesota Supreme Court noted that "Blue Cross seeks relief independent from that available to smokers, such as pain and suffering," *id.*, at 493, and held that Blue Cross could "join" the State in pursuing its consumer protection and antitrust statutory claims. *Id.* at 493, 495. Thus, at the close of evidence, the District Court instructed the jury that "this case is a direct action brought by the state of Minnesota and Blue Cross and Blue Shield of Minnesota. No individual smoker is a party to this action." R.A. 7-8.[2]

The Settlement of the State of Minnesota's Tobacco Litigation

The State of Minnesota, a pioneer in the Attorneys General tobacco litigation, reached a settlement on May 8, 1998, shortly before the jury was to begin deliberations. The settlement includes extensive injunctive relief against the tobacco industry and billions of dollars in payments

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[2] Petitioners' partial citation to the jury instructions on damages is misleading. Pet. 9. The instruction in full demonstrates that the State (and Blue Cross) were asserting direct claims. *See* A. 41 ("The term 'damages' means a sum of money that will fairly compensate the state of Minnesota and Blue Cross and Blue Shield of Minnesota for their payment of health-care costs caused by smoking.").

to the State in perpetuity. A. 55-86.[3] The State settled State claims – and not the personal injury claims of any smokers, including welfare recipients. This point is underscored in the Settlement Agreement and Stipulation for Entry of Consent Judgment ("Settlement Agreement"):

> The payments to be made by the Settling Defendants under this Settlement Agreement are **in satisfaction of all of the State of Minnesota's claims for damages incurred by the State** in the year of such payment or earlier years related to the subject matter of this action, including, without limitation, claims for equitable and injunctive relief, claims for health care expenditures and claims for punitive damages, except that no part of any payment under this Settlement Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages.

A. 61 (emphasis added). The Settlement Agreement further provides that the State releases and discharges the tobacco defendants from claims:

> that **the State of Minnesota** (including any of its past, present or future administrators, representatives, employees, officers, attorneys, agents, representatives, officials acting in their official

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[3] The settlement monies being paid to the State are deposited in the General Fund and appropriated by the State Legislature. In 1999, the Legislature appropriated $968 million of the first $1.3 billion in settlement proceeds to two public health endowments. *See* Minn. Stat. §§ 16A.87, 62J.694 and Minn. Stat. § 144.395. In addition, approximately $200 million of the State's settlement is being dedicated to a non-profit foundation for tobacco control.

> capacities, agencies, departments, commissions, and divisions, and whether or not any such person or entity participates in the settlement), whether directly, indirectly, representatively, derivatively or in any other capacity ever had, now has or hereafter can, shall or may have . . .

A. 67 (emphasis added).

The Settlement Agreement also states that the rights of non-parties are not prejudiced:

> Except as expressly provided in this Settlement Agreement, no portion of this Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such person or entity.

A. 79.

In short, it is not accurate, as stated by petitioners, that the State "unilaterally settle[d] 70,000 Medicaid recipients' medical damages claims against the tobacco industry . . . " Pet. 3. Indeed, the petition fails to fully acknowledge that there is no dispute that class members have retained their rights to pursue their own personal injury claims against the tobacco industry and recover against the tobacco industry for their own personal injuries, including lost wages and pain and suffering. There is also no dispute that the only damages that class members cannot recover are medical costs paid by the State. A. 9.

The Litigation of State Issues in the Putative Welfare Recipient Class Action

Two months after the State's settlement, petitioners filed a putative class action in state court seeking as much

as two-thirds of the State's recovery. The suit demanded that the State pay the Medicaid and General Assistance recipients billions of dollars from the tobacco settlement for, *inter alia*, the payment of these bills by the State in the first instance.

The class action complaint focused on state – not federal – statutes. A. 95. The two counts in the Amended Complaint cite only state statutes, A. 101-104, and the prayer for relief cites only state welfare statutes for the division of proceeds (all of which – on their face – apply to claims brought by welfare recipients themselves, as opposed to direct claims brought by the State). *Id.*

Throughout the proceedings below, the federal Medicaid statutory scheme was referenced only as a backdrop to the state statutes, which provided the specific claims for relief. Significantly, the constitutional issues of taking of property and due process – the sole questions presented in the petition for review – were by petitioners' own admission "neither framed nor argued." Pet. 16.

Accordingly, the decisions of the District Court and the Minnesota Court of Appeals were based solely upon Minnesota law. The District Court found that:

> Minnesota statutes and the law of the tobacco case lead this court to conclude that plaintiffs' claims are wholly without support. The State of Minnesota and Blue Cross brought a *direct action* against the tobacco companies, a distinction that alone dictates the outcome.
>
> . . .
>
> Were plaintiffs able to recover under the statutes that this court believes are clearly inapplicable,

> they would be entitled to receive between $2.06 billion and $4.86 billion dollars, as compensation for medical expenses that they, for the most part, never incurred, an amount in *addition* to whatever amount any of the individual plaintiffs might receive for his or her compensable damages, such as pain and suffering. Their individual claims are not foreclosed by the settlement. Certainly that is an absurd result.

A. 31, 33 (emphasis in original).

The Minnesota Court of Appeals affirmed on the basis of state law.[4] The Court of Appeals noted that petitioners' alleged basis for recovery was state welfare statutes ("In this case, appellants' two-count complaint asserts statutory claims under the Minnesota medical-assistance and general assistance programs as the basis for recovery . . . "), and that the State's direct claims "did not implicate" and "were outside the scope" of the state welfare statutes. A. 8. Finally, the court held that even if the state welfare statutes were implicated, those state statutes "do not provide an avenue for the appellants to obtain a portion of the state's settlement." A. 8-9.

The petitioners assert that the constitutional issues were not presented below because the issue of future damages did not arise until the proceedings in the Minnesota Court of Appeals. Pet. 16 ("Until the State's admission related to future damages, and the Minnesota Court of Appeals' adoption of that admission, the constitutional

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[4] The Court of Appeals reversed the District Court's imposition of sanctions on petitioners' counsel. A. 12-13.

issues were neither framed nor argued.") This assertion is a substantial misstatement of the proceedings below.

The Settlement Agreement itself clearly encompassed future damages. *See, e.g.*, A. 66-67 (releasing tobacco companies from claims that the State "ever had, now has or hereafter can, shall or may have . . . "). In the District Court, the State stated that it had sued the tobacco companies for, *inter alia*, "past and future damages" (A. 117) and that the Settlement Agreement "provides not just for payment of past damages, but also for the ongoing harm caused to the State from the continuing use of tobacco products." A. 129. Indeed, the petition (contradicting itself) notes "the State's outright *admission* to the trial court that it had settled Petitioners' past and future medical damages claims." Pet. 14 (emphasis in original).[5]

Petitioners themselves also repeatedly recognized the issue of future damages from the outset of the proceedings below. For example, petitioners' statements to the District Court included the following:

• The settlement documents release the tobacco companies from not only the $1.3 billion of medical expense for 70,000 victims of smoking, but **future medical expense** and general expense for those same victims . . . " R.A. 11 (emphasis added).

• "There is no more claim for that medical expense. That has been forever discharged by the State for the 70,000 victims of smoking, either past expense **or future expense** . . . " R.A. 11-12 (emphasis added).

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[5] The State did settle the State's future claims, but not petitioners' own personal injury claims, past or future.

• "[T]he State brought, settled and released their claims for past and **future medical expenses** against liable third parties – the tobacco defendants." R.A. 14 (emphasis added).

• "Damages for past **and future costs** arising out of those claims have now been brought, settled, and forever compromised. . . . " R.A. 15 (emphasis added).

• "The State settled and released the past **and future medical expense claims** of all public assistance recipients. . . . " R.A. 17 (emphasis added).

In sum, it is a misstatement for petitioners to contend that "the State's position as to what it settled changed at each level of review," with future damages not being raised until the Minnesota Court of Appeals. Pet. 13 n.10. It is a further misstatement for the petition to contend that the Minnesota Court of Appeals' decision somehow raised a new issue regarding future damages. The Court of Appeals' decision merely noted that "[b]oth parties agree" that "the state's settlement precludes individual medical- and general-assistance recipients from pursuing claims for past or future health care costs covered by the state's medical- or general-assistance programs." A. 9.

REASONS FOR DENYING THE WRIT

1. There Is No Jurisdiction Because the Federal Issues Were Not Raised Below

Petitioners pose as federal questions takings and due process violations under the Fifth and Fourteenth Amendments to the United States Constitution. Pet. 1-2, 19-27. The opinion for which review is sought clearly

does not decide those issues. A. 2-14. Thus, petitioners must overcome the presumption that those arguments were not properly presented below. *Street v. New York*, 394 U.S. 576, 582 (1969); Supreme Court Rule 14.1(g)(i). Petitioners concede, however, that the constitutional issues posed in the petition were not raised before the trial court or the intermediate court of appeals. Pet. 16 ("the constitutional issues were neither framed nor argued" below).[6] This Court will not assume jurisdiction over federal claims raised for the first time in the petition for certiorari. *White River Lumber Co. v. Arkansas ex rel. Appelgate*, 279 U.S. 692, 700 (1929).

Petitioners appear to invoke the narrow exception that a federal claim may be considered adequately presented when a highest state court renders an unexpected interpretation of state law. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *see* Pet. 16. That theory is unavailing. First, petitioners' suggestion that the Minnesota Court of Appeals' ruling unexpectedly dealt with future claims is specious. As shown above, throughout the state court litigation, petitioners argued that future claims had been settled by the State. R.A. 11-12, 14-15, 17. Petitioners did file a petition to the Minnesota Supreme Court (R.A. 20), which was denied. *See Yee v. City of Escondido*, 503 U.S. 519, 532-34 (1992) (raising due process for the first time in unsuccessful petition for review to highest state court insufficient under 28 U.S.C.

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[6] The petition's loose language that the Court of Appeals found that there was no "taking" (Pet. 23) is contrary to both the record and the admissions elsewhere in the petition that the constitutional issues were not raised below.

§ 1257).[7] In that petition, while petitioners made vague references to "due process" and "unjust taking, due process and equal protection," (R.A. 25) only state law issues were posed as issues to be reviewed. R.A. 20-21.[8]

The requirement that a federal claim be presented below has been characterized both as jurisdictional and prudential. *Yee*, 503 U.S. at 533. Even treating the rule as prudential, the petition should be denied. It is not appropriate to disturb the finality of state court judgments on a

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[7] Any attempt by petitioners in reply to show that the federal constitutional claims were raised below would be without merit. *Adams*, 520 U.S. at 87 (1997) (requiring that the issue be raised in a manner proper under state procedure). Under Minnesota law, constitutional issues raised for the first time on appeal will not be considered. *Minnesota v. Modern Recycling*, 558 N.W.2d 770, 772 (Minn. Ct. App. 1997). Petitioners' failure to comply with Minnesota's procedural requirement constitutes an independent and adequate state ground on which the state court would have refused to consider the federal claims. *Webb v. Webb*, 451 U.S. 493, 498 n.4 (1981).

[8] Petitioners did not cite to the federal constitution in their petition to the Minnesota Supreme Court. Where parties in state proceedings plead causes of action based on language found in both federal and state constitutions or statutes, this Court has presumed that the parties were making reference to state law. *See Webb v. Webb*, 451 U.S. at 496-98 ("full faith and credit" deemed to refer to state law), *Bowe v. Scott*, 233 U.S. 658 (1914) ("due process" deemed to refer to clause in state constitution). The Minnesota Constitution has takings and due process clauses. *See* Minn. Const. Art. 1 § 13 (takings), §§ 6, 7 (due process). In fact, the present petition correctly does not contend that the federal issues of taking and due process were raised below. *See* Supreme Court Rule 14.1(g)(i) (requiring specification when the federal questions sought to be reviewed were raised).

federal ground that the state court did not consider. *Webb*, 451 U.S. at 501.

2. The Decision For Which the Petition Seeks Review Rests Upon Independent and Adequate State Grounds

The decision for which petitioners seek review rests solely on the interpretation of Minnesota statutes, and thus this Court's jurisdiction is further wanting. *See Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983) (no jurisdiction to review state court opinion resting on state grounds). The Court of Appeals was correct in basing its decision solely on state law grounds as petitioners' Amended Complaint asserted only Minnesota statutes as a basis for relief. A. 101-105.

Here, petitioners emphasize the role of the federal Medicaid statutes in their claims. *See* Pet. 2, 15. Petitioners concede, however, that they made only "general references to federal law" in the state courts. Pet. 12. This Court's jurisdiction may not be invoked on the basis of passing references to federal statutes. *Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956).

In any event, the Minnesota Court of Appeals' construction of Minnesota law obviated any need to interpret the federal Medicaid statutes or post-hoc constitutional claims. The court rejected any construction of state law that would bring the federal Medicaid statutes into play, by finding that the state statutes to which the federal statutes are a background simply provided no basis for petitioners' suit. A. 8-9 (petitioners' claims "did not implicate the medical- and general-assistance statutes").

The court expressly stated that this holding was sufficient to support its opinion, P.A. 8-9, but in the alternative analyzed petitioners' claims as if the state statutory scheme they asserted was applicable (A. 9-12), and also disposed of those statutory claims on state law grounds. A. 11 ("[b]ased upon our interpretation of the [state] recovery-allocation statutes, we agree with the district court's dismissal of appellants' complaint"). There is no federal jurisdiction where a state court's construction of state law removes any federal question from the case. *See Fox Film v. Muller*, 296 U.S. 207, 210-11 (1935).

3. There Is No Conflict Among the Courts

Petitioners argue that there is a conflict among various courts. However, the cases petitioners offer as creating a conflict, *Floyd v. Thompson*, 227 F. 3d 1029 (7th Cir. 2000) and *State of California v. Superior Court*, 99 Cal. Rptr.2d 735 (Cal. App. 2000), reach the same result as the Minnesota Court of Appeals: all claims by putative classes of Medicaid recipients to any of the states' tobacco recoveries are rejected.[9] Lower court decisions across the

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[9] *Floyd v. Thompson*, 227 F. 3d 1029 (7th Cir. 2000) does not, as petitioners contend, hold that the State could settle only claims for past medical costs. *See* Pet. 24. Rather, the court found that the assignment in that case covered "the amounts the state pays," but not those "claims for medical services that were not covered by Medical Assistance," *i.e.*, medical expenses incurred by individuals, not the State. *Id.* at 1037. The Minnesota Court of Appeals drew this same conclusion. A. 9.

country also appear unanimous against petitioners' claims.[10]

The minor variations in the reasoning employed to reach identical results reflects not conflict between courts, but the state law nature of the issue. Each state has differing laws regarding third-party payments to recipients receiving assistance, therefore the analysis under those laws may differ slightly. Minnesota, in fact, entered into its own settlement with the tobacco industry and was not even part of the multi-state Master Settlement Agreement at issue in the other court decisions. Also, that there are multiple bases for rejecting claims akin to those pressed by petitioners merely shows that petitioners' claims are flawed in numerous respects. *See State of California*, 99 Cal. Rptr. 2d at 739 ("there are several problems with [plaintiffs'] analysis, any of which alone would defeat [recipient class'] claims"); *Strawser v. Lawton*, 126 F. Supp. 2d at ___, 2001 WL 8406, * 6 (dismissing claims of recipient class on the basis of 42 U.S.C. § 1396b(d)(3)(B)(ii), but noting that "[t]he Court has chosen but one of a host of analyses warranting dismissal of Plaintiffs' claims").

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[10] *See Strawser v. Lawton*, 126 F. Supp. 2d 994 (S.D.W.V. 2001); *Skillings v. Illinois*, 121 F. Supp. 2d 1235 (C.D. Ill. 2000); *Martin v. New Mexico*, 197 F.R.D. 694 (D. N.M. 2000); *Tyler v. Douglas*, ___ F. Supp. 2d ___, 2000 WL 1146575 (D. Vermont 2000); *Barton v. Summers*, 111 F. Supp. 2d 989 (M.D. Tenn. 2000); *Cardenas v. Anzai*, ___ F. Supp. 2d ___, 2001 WL 58857 (D. Haw. Jan. 18, 2001).

4. The Minnesota Court of Appeals Correctly Interpreted the Relevant Minnesota Statutes in Affirming Dismissal of Petitioners' Claims

The claims by the putative class rested upon the contention that state Medicaid and General Assistance statutes which deal with derivative claims – either via liens or subrogation by the State – were applicable. As explained at length above, the State filed a direct action against the tobacco industry and did not assert as a basis for recovery the welfare statutes cited by petitioners, or any other derivative rights.

A. Minnesota's Medicaid and General Assistance Statutory Schemes

In Minnesota, two programs – Medicaid and General Assistance – provide publicly-funded medical care to persons in need. Medicaid is a joint federal-state program that is administered on the state level. The federal statutes and regulations set broad parameters for the program. *See* 42 U.S.C. § 1396, *et seq.* Minnesota statutes enacted to administer the program are consistent with the federal rules. *See* 42 C.F.R. 430.10, *et seq.* (state plans must conform with federal requirements); *Lundberg v. Jeep Corp.*, 582 N.W.2d 268, 270 (Minn. App. 1996) ("Minn. Stat. § 256B.042 complies with the federal requirements . . . ").

General Assistance is solely a state-funded program. The Minnesota General Assistance program is neither reviewed nor approved by the federal government.

Both the Medicaid and General Assistance statutes require recipients to assign to the State their rights to recover medical expenses from third parties as a condition of receiving medical benefits. This assignment is consistent with the aim of reducing the burden on taxpayers since the government – and not the recipients – pays for the care. Thus, Minn. Stat. § 256B.056, subd. 6 mandates that a person, by signing an application for Medicaid "assigns to the department of human services all rights that person may have to . . . payments for medical expenses from any other." *See also* 42 U.S.C. § 1396k(a)(1)(A) (state plans to include assignment provisions). Similarly, a recipient of General Assistance "assigns to the department of human services all rights to medical support or payments for medical expenses from another person or entity." Minn. Stat. § 256D.03, subd. 3a.

The state Medicaid and General Assistance statutes provide for various options for the State to recover taxpayer dollars through claims derivative of the rights of welfare recipients. Petitioners asserted three statutes as the basis of their claims in their amended complaint: 1) Minn. Stat. § 256B.042 (providing authority for liens for the State under the Medicaid program); 2) Minn. Stat. § 256B.37 (providing authority for subrogation rights for the State under the Medicaid program); and 3) Minn. Stat. § 256D.03 (providing authority for subrogation rights for the State under the General Assistance program).

The cited lien and subrogation provisions have similar formulas as to how recoveries obtained pursuant to these provisions are to be distributed. The lien statute provides:

> Costs Deducted. Upon any judgment, award, or settlement of a cause of action, or any part of it, **upon which the state agency has filed its lien**, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. **The plaintiff**, however, must receive at least one-third of the net recovery after attorney fees and other collection costs.

Minn. Stat. § 256B.042, subd. 5 (emphasis added). The distribution formula for cases where an agency has asserted a Medicaid subrogation interest contains the same language, except that it expressly applies to judgments, awards or settlements "upon which the state agency has a subrogation right." Minn. Stat. § 256B.37, subd. 4. The General Assistance formula is virtually identical. Minn. Stat. § 256D.03, subd. 8 (f).

B. The Distribution Formulas in the Welfare Statutes Do Not Apply To The State's Tobacco Settlement

The Minnesota Court of Appeals correctly found that the State of Minnesota's claims against the tobacco industry did not implicate the state statutes upon which petitioners rely. A. 8. The State prosecuted its claims through a direct action, asserting only its own rights, not derivative (or what the petitioners refer to, inaccurately, as "shared rights"). The State neither filed nor asserted liens

or subrogation interests.[11] The State was free to proceed in a direct action as, under Minnesota law, a statutory cause of action is cumulative of other remedies unless the statute clearly provides otherwise. *See, e.g., In re Shetsky*, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953) ("An existing common-law remedy is not to be taken away by a statute except by express wording or necessary implication."). Indeed, in response to the identical argument by the tobacco companies that the State's case was a derivative one asserting subrogation interests, the Minnesota Supreme Court recognized that the State's action was a direct one: "Blue Cross [which filed a consolidated complaint pleading identical causes of action as the State] seeks relief independent from that available to smokers, such as pain and suffering" and Blue Cross can "join the State of Minnesota in pursuit of relief for these claims." *State v. Philip Morris*, 551 N.W.2d at 492, 495.

In any event, even if the state statutes pursued by petitioners were applicable, the rejection of petitioners' claims by the Minnesota courts was correct. As the Minnesota Court of Appeals found, the recovery allocation provisions of those statutes do not allow allocation of any share of the State's settlement to petitioners. A. 8-12. The

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[11] Petitioners' repeated assertions that the State has not waived its lien or subrogation interests and that petitioners are therefore at risk for reimbursement to the State are not accurate. The State specifically acknowledged below that it would not have rights to recoup State-paid medical care in personal injury cases brought by recipients against the tobacco industry. R.A. 32 ("the State doesn't have a right to a penny . . . "); R.A. 35 ("[T]he State would not have claim out of any recovery by welfare recipient/smokers . . . ").

three distribution formulas at issue on their face are dispositive of petitioners' claims. First, the distribution formulas expressly apply only where liens or subrogation interests are involved. Minn. Stat. § 256B.042, subd. 5 applies where "**the state has filed its lien. . . .** " (emphasis added). Both Minn. Stat. § 256B.37, subd. 4 and Minn. Stat. § 256D.03, subd. 8(f) apply only to "any judgment, award, or settlement of a cause of action, or any part of it **upon which the state agency has a subrogation right . . .** " (emphasis added). The State has no such lien or subrogation rights in the tobacco settlement because that settlement was for the State's own injuries.

Moreover, the final sentence of each of the three formula statutes is identical, and further precludes any recovery by petitioners:

> **The plaintiff**, however, must receive at least one-third of the net recovery after attorney fees and other collection costs.

Minn. Stat. § 256B.042, subd. 5, Minn. Stat. § 256B.37, subd. 4, and Minn. Stat. § 256D.03, subd. 8(f) (emphasis added). In the present case, petitioners were not plaintiffs in any claim or lawsuit producing a recovery against the tobacco industry.[12]

The explicit statutory language which precludes petitioners' claims is supported by sound policy. The welfare statutes provide the State with authority to recoup taxpayers' monies from third parties. To this end, welfare

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[12] The petition inaccurately states that "**the injured party** is guaranteed 33 1/3 percent of the net recovery . . . " Pet. 8 (emphasis added). The state statutes use the term "plaintiff."

recipients must assign their claims against third parties to the State. The distribution formulas provide a limited exception to this general scheme in order to encourage recipients to bring actions against third parties responsible for their injuries by insuring that at least one-third of the recovery goes to the "plaintiff," even in cases where a lien or subrogation interest asserted by the State might otherwise be so large as to completely eviscerate the recipient-plaintiff's recovery. In the present case, the recipients' personal injury claims – for pain and suffering, lost wages, etc. – remain intact since they were not implicated in the State's settlement.

5. Federal Legislation Subsequent to the Tobacco Settlement Confirms That Petitioners Have No Claim To The State's Settlement

The federal Medicaid statutes cited in the petition also provide petitioners no relief, as they are neither inconsistent with the state Medicaid statutes nor specifically asserted by petitioners below as a basis for relief.[13] Moreover, in May 1999 Congress amended the Medicaid laws – specifically with respect to State settlements with the tobacco industry – to confirm that federal law entitles States to retain the full amount of their respective settlements.

First, the amendment restricted any right the federal government arguably might have had to receive its portion of Medicaid funding:

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[13] Of course, the federal Medicaid statutes are not applicable to petitioners' state General Assistance claims.

> (B)(i) Subparagraph (A) and paragraph (2)(B) [providing for federal recoupment] shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products . . . and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers . . .

42 U.S.C. § 1396b(d)(3)(B)(i). Congress also made it clear that the funds were to be unencumbered by other claims, including those pressed by petitioners:

> (B)(ii) Except as provided in subsection (i)(19) [which allows payment of administrative costs associated with bringing suits against the tobacco industry] **a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement . . . for any expenditures deemed appropriate by the State.**

42 U.S.C. § 1396b(d)(3)(B)(ii) (emphasis added). Thus, Congress has made it clear that there is no federal law claim by either recipients or the federal government to a share of a State's settlement. *See Strawser*, 126 F. Supp. 2d at ___, 2001 WL 8406, at * 6 (the amendment at 42 U.S.C. § 1396b(d)(3)(B)(ii) gives the states "a complete right, title and interest to the settlement proceeds" and defeats any claim that the refusal to share the proceeds with a recipient class is a violation of federal law); *Tyler*, 2000 WL 1146575, * 2 (in light of the amendment, the Vermont

putative recipient class has failed to allege a violation of federal law).[14]

6. Petitioners' Post-Hoc Constitutional Arguments Have No Merit

Petitioners' claim of an unconstitutional taking rests on their unsupported assertions that petitioners retained a property interest in any future claims for tobacco-related medical costs, even if those claims are paid by the State. *See* Pet. 19-22. Of course, since the State of Minnesota's case was brought independently of the asserted statutes, and resulted in the settlement of the State's claims, not those owned by the recipients, petitioners' argument fails. But even if the Minnesota statutes did apply, petitioners' argument would be contrary to the statutes. Throughout their petition, and always without citation, petitioners argue that a recipient's assignment of rights to the State that was a prerequisite for participation in the welfare programs is limited to claims for past medical costs. *See, e.g.*, Pet. 16-17 ("Petitioners entered into a contract of assignment with the State thereby creating a right of the State to a lien and subrogation interest in the right to payment for *past* medical costs only."); *see also* Pet. 21-22. Purportedly, all claims for future medical costs, notwithstanding that those claims would also be

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[14] Petitioners cite this statute in their petition but note only the portion which addresses any federal government claims to the settlement proceeds, failing to note the portion which addresses other claims, including their own. Pet. 9 n.6. Petitioners never raised a constitutional argument below with respect to this statute.

program costs paid by the State of Minnesota, remained causes of action vested in the recipients, and form the alleged "property interest" for petitioners' generic constitutional allegations. *See* Pet. 22.[15]

The Minnesota statutes do not, however, carve out past claims that are assigned and future claims that are not assigned. The assignment to the State is of "all rights" to payments on a recipient's behalf. See Minn. Stat. § 256B.056, subd. 6 ("a person assigns to the department of human services *all rights* to medical support or payments for medical expenses from another person or entity . . . ") (emphasis added); *see also* Minn. Stat. § 256D.03, subd. 3(a) ("a person assigns to the department of human services *all rights* to medical support or payments for medical expenses from any other person or entity . . . ") (emphasis added); 42 U.S.C. § 1396k(a)(1)(A) (state must require recipient to assign "any rights"). Indeed, the structure of the assignment statutes rules out petitioners' distinction between past and future medical cost claims. The assignments occur at the time the recipient applies for benefits. Minn. Stat. § 256D.03, subd. 3(a) ("By signing an application for general assistance, a person assigns . . . "); *see also* Minn. Stat. § 256B.056, subd. 6 (same). Therefore, the statutes' assignment is forward looking and anticipates the assignment of future claims, as any past claims (excluding those subject to the three

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[15] Petitioners contradict their own argument that only past claims were assigned when they contrast Minnesota's statutory scheme to that of Wisconsin. Petitioners claim that in Wisconsin, there is no assignment of future costs, then state that "in stark contrast," the rights of the State of Minnesota run to "all causes of action, or any part thereto." Pet. 24.

month look-back provision in § 256B.056, subd. 6) would arise before the recipient becomes part of the program and assigns his or her claims.[16]

Even without these assignment statutes, generally recoupment for the payment of medical costs rests ultimately with the entity which paid the medical bills under Minnesota law. For example, the Minnesota collateral source statute, Minn. Stat. § 548.36, provides that payments made on a plaintiff's behalf by, *inter alia*, a "public program providing medical expenses" or by "health, accident and sickness, or automobile accident insurance" that are not subject to an asserted claim of subrogation are eliminated from a personal injury award.

The due process cases cited by petitioners establish that the "hallmark of property . . . is individual entitlement grounded in state law." *Logan v. Zimmerman*, 455 U.S. 422, 430 (1982); *see also Perry v. Sindermann*, 408 U.S. 593, 602 n.7 (1972) ("[p]roperty interests . . . are created

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[16] Petitioners' attempted distinction between the assignment of their "right to payment" – which they concede occurs (Pet. 15) – and the assignment of their "claim" – which they refute (*id.*) – is spurious. The Minnesota Court of Appeals refers both to the assignment of "**any claim** . . . for medical expenses . . . " and "**the legal right** to recover the medical expenses . . . " A. 10 (emphasis added), in implicit recognition of the fact that the terminology makes no difference. In fact, in the state District Court, petitioners conceded that, " . . . the State is required to obtain an assignment from each Medical Assistance recipient as to **any rights** he or she may have against third parties . . . " R.A. 17 (emphasis added). Moreover, the goal of petitioners' class action is to "receive payment," a right they admit was assigned to the State in exchange for the State making payments on the recipients' behalf.

and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). Here, the state statutes that prevent petitioners from reaping their claimed windfall are "merely one aspect of the State's definition of [the] property interest." *Martinez v. California*, 444 U.S. 277, 282 n.5 (1980) (legislature's adoption of an immunity defense is not a "taking," rather it is the state law's shaping of the property interest); *see also Logan*, 455 U.S. at 432-433 (a welfare recipient is not deprived of due process when a legislature adjusts benefit levels; the legislative determination provides all process that is due). Thus, there has been no "taking" of any "property." As the Minnesota Court of Appeals found, petitioners "currently have the same rights they had prior to the tobacco settlement. They have the right to bring a claim for damages against the tobacco defendants, but they do not have the right to retain the damages representing the state-paid medical expenses." A. 10. Since Minnesota and federal law does not extend them that right in the first instance, nothing has been taken from them.

CONCLUSION

The petition should be denied. Petitioners provide no basis for this Court's certiorari jurisdiction.

Dated this 19th day of March, 2001

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

256B.042. Third party liability [Medical Assistance for Needy Persons]

Subd. 1. Lien for cost of care. When the state agency provides, pays for, or becomes liable for medical care, it shall have a lien for the cost of the care upon any and all causes of action or recovery rights under any policy plan, or contract providing benefits for health care or injury, which accrue to the person to whom the care was furnished, or to the person's legal representatives, as a result of the illness or injuries which necessitated the medical care.

Subd. 3. The attorney general shall represent the state agency to enforce the lien created under this section or, if no action has been brought, may initiate and prosecute an independent action on behalf of the state agency against a person, firm, or corporation that may be liable to the person to whom the care was furnished.

Subd. 5. Costs deducted. Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has filed its lien, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must

receive at least one-third of the net recovery after attorney fees and other collection costs.

256B.056. [Medical Assistance for Needy Persons]

Subd. 6. Assignment of benefits. To be eligible for medical assistance a person must have applied or must agree to apply all proceeds received or receivable by the person or the person's spouse from any third person liable for the costs of medical care for the person, the spouse, and children. The state agency shall require from any applicant or recipient of medical assistance the assignment of any rights to medical support and third party payments. Persons must cooperate with the state in establishing paternity and obtaining third party payments. By signing an application for medical assistance, a person assigns to the department of human services all rights the person may have to medical support or payments for medical expenses from any other person or entity on their own or their dependent's behalf and agrees to cooperate with the state in establishing paternity and obtaining third party payments. Any rights or amounts so assigned shall be applied against the cost of medical care paid for under this chapter. Any assignment takes effect upon the determination that the applicant is eligible for medical assistance and up to three months prior to the date of application if the applicant is determined eligible for and receives medical assistance benefits. The application must contain a statement explaining this assignment . . .

256B.37. Private insurance policies, causes of action [Medical Assistance for Needy Persons]

Subd. 1. Subrogation. Upon furnishing medical assistance to any person who has private accident or health care coverage, or receives or has a right to receive health or medical care from any type of organization or entity, or has a cause of action arising out of an occurrence that necessitated the payment of medical assistance, the state agency or the state agency's agent shall be subrogated, to the extent of the cost of medical care furnished, to any rights the person may have under the terms of the coverage, or against the organization or entity providing or liable to provide health or medical care, or under the cause of action. The right of subrogation created in this section includes all portions of the cause of action, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to subrogation.

Subd. 2. Civil action for recovery. To recover under this section, the attorney general may institute or join a civil action to enforce the subrogation rights established under this section.

Subd. 4. Recovery. Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has a subrogation right, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical

assistance paid to or on behalf of the person as a result of the injury must be deducted next and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and collection costs.

256D.03. Responsibility to provide general assistance

Subd. 3(a). Claims; assignment of benefits. Claims must be filed pursuant to section 256D.16. General assistance medical care applicants and recipients must apply or agree to apply third party health and accident benefits to the costs of medical care. They must cooperate with the state in establishing paternity and obtaining third party payments. By signing an application for general assistance, a person assigns to the department of human services all rights to medical support or payments for medical expenses from another person or entity on their own or their dependent's behalf and agrees to cooperate with the state in establishing paternity and obtaining third party payments. The application shall contain a statement explaining the assignment. Any rights or amounts assigned shall be applied against the cost of medical care paid for under this chapter. An assignment is effective on the date general assistance medical care eligibility takes effect . . .

Subd. 8(c). Upon furnishing general assistance medical care or general assistance to any person having private accident or health care coverage, or having a cause

of action arising out of an occurrence that necessitated the payment of assistance, the state agency shall be subrogated, to the extent of the cost of medical care, subsistence, or other payments furnished, to any rights the person may have under the terms of the coverage or under the cause of action.

This right of subrogation includes all portions of the cause of action, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to subrogation.

Subd. 8(d). To recover under this section, the attorney general may institute or join a civil action to enforce the subrogation rights established under this section.

Subd. 8(f). Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has a subrogation right, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of general assistance or general assistance medical care paid to or on behalf of the person as a result of the injury must be deducted next and paid to the state agency. The rest must be paid to the public assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and collection costs.

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42 USC § 1396b

(d)(3)(A) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.

(B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26 [26 U.S.C.A. § 5702(d)], and State Attorney General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

(ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

The State of Minnesota,
by Hubert H. Humphrey, III,
its attorney general,
and
Blue Cross and Blue Shield
of Minnesota,

Plaintiffs,

vs. File No. C1-94-8565

Philip Morris Incorporated, R.J.
Reynolds Tobacco Company, Brown
& Williamson Tobacco Corporation,
B.A.T. Industries P.L.C., Lorillard
Tobacco Company, The American
Tobacco Company, Liggett Group, Inc.,
The Council for Tobacco Research – U.S.A.,
Inc., and the Tobacco Institute, Inc.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME 77, PAGES 15559 - 15667

May 6, 1998

* * *

JURY CHARGE

[15643] You are instructed that this case is a direct [15644] action brought by the state of Minnesota and Blue Cross and Blue Shield of Minnesota. No individual smoker is a party to this action. The actions of individual smokers do

not insulate defendants from liability since the actions of smokers; for example, the fact that they smoke, are both foreseeable by defendants and in accord with defendants' intention for use of their product. Any knowledge by smokers of any health risks of cigarettes or any conduct of the smokers is not a defense as to whether a defendant or defendants have violated the law in this case.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Jesse Lee Brown, and Ronald J. Bergerson, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

State of Minnesota,

Defendant.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

File No. 98-11152

The above-entitled matter came on for hearing before the Honorable H. Peter Albrecht, Judge of the above Court, at the Brookdale Courthouse, Brooklyn Center, Minnesota, on the 16th day of September, 1998.

* * *

[3] Summary judgment motion or summary judgment motion so between Mr. Ciresi and myself, we'll go first.

MR. CIRESI: We agreed that the defendants or the plaintiffs can go first, Your Honor, but that doesn't convert procedurally our motion into a summary judgment motion. It's still a 12.02 motion.

THE COURT: Let me ask this, are we in agreement that the motions are so similar and so overlapped that we'll just go ahead and the plaintiffs would argue completely, short of the sanctions issue, or you can do

that if you want, and then the State would go ahead and argue?

MR. CIRESI: That's correct.

THE COURT: Thanks. Mr. Plunkett.

MR. PLUNKETT: Thank you, Your Honor. I still contend in their pleadings that they acknowledge that this can go forward as a summary judgment motion. I know the Court's not going to find this easy to see but without a pedestal I'll try to refer to it.

Your Honor, my partner and co-counsel and I are here on behalf of our client and 70,000 victims of smoking to ask that their rights be declared under two separate provisions of the Minnesota Statutes, the Medicaid and the General Assistance Medical Care statutes and three separate sections under those,

* * *

[5] programs were two of the sources of compensatory damages which the State sought in the tobacco lawsuits. That's in their opposition brief, Your Honor. The Medicaid and General Assistance medical expense of 70,000 victims of smoking was pled in the complaint as a basis for their claim against the tobacco companies. The whole damage claim at trial $1.3 billion based on the testimony of Dr. Wyant and other experts was premised on the medical expenses arising under those statutes for the 70,000 victims of smoking. The settlement agreement delineates payment of $1.3 billion for those very claims. This is the full Medical Assistance and General Assistance claim of the State arising out of the expenses

incurred for our clients' illnesses. The settlement documents release the tobacco companies from not only the $1.3 billion of medical expense for 70,000 victims of smoking, but future medical expense and general expense for those same victims, and therein lies the rub, Your Honor. What has happened is the State has cut away a safety net that has been provided to those 70,000 victims. That safety net was mandated by the legislature.

Now, Your Honor, the provisions I cited to you before are the ones at issue here and let me explain how that safety net works. These statutes are

* * *

[7] order to be entitled to one-third. Well, that is false, Your Honor. The opening paragraph says, "Upon judgment, award, or settlement of a cause of action or any part of it."

Now, you can certainly have a settlement without being a plaintiff in a lawsuit. It happens every day, throughout the country. They have argued in their brief that you must have brought a lawsuit. Settlement doesn't require a lawsuit, Your Honor, and still the formula applies.

Now, the problem here and as stated by the State in their brief, recipients are guaranteed one-third of the net award even if the Medicaid lien or General Assistance medical care subrogation interest is not fully satisfied. That is the safety net that the legislature put in for these recipients. There is no more claim for that medical expense. That has been forever discharged by the State for the 70,000 victims of smoking, either past expense or

future expense, that guarantee has been taken away from them. If this is the only recovery that is ever made on behalf of these Medical Assistance recipients, than they will have lost the right to one-third of that amount, which they had guaranteed by the legislature. It's not absurd to assume that that is the case because assume, for

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case Type: Declaratory Judgment

JESSE LEE BROWN and RONALD J. BERGERON, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

THE STATE OF MINNESOTA,

Defendant.

Court File No.: 98-11152

EXCERPTS FROM PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS

* * *

based upon a variety of legal theories. The State set out to prove that the tobacco industry illegally conspired to suppress research on the adverse health effects of smoking, that it manipulated the nicotine levels in cigarettes to induce addiction in smokers, and thereby caused smoking-related illnesses in countless Minnesotans. Despite the wide-ranging monetary relief it pled in the abstract, the State's actual evidence on economic injury was narrow and focused. In fact, the only damages evidence the State brought to the jury on the topic was a statistical model as to the amount of money it spent to treat approximately 70,000 adult participants in the State's Medical Assistance and General Assistance programs (hereinafter collectively referred to as "public assistance recipients")

who were treated for smoking-related illnesses during the years 1978 through 1996.[3] Based upon its expert testimony at trial, the State's economic damages totaled $1.31 billion.

The Tobacco Litigation was settled on May 8, 1998. In exchange for its broad release and discharge of every conceivable cause of action that was asserted or could have been asserted against the tobacco defendants, the State will receive a "perpetual stream of payments" estimated to total at least $6.17 billion over the next 25 years. *See* Settlement Agreement and Stipulation for Entry of Consent Judgment (hereinafter referred to as the "Settlement Agreement") (Exhibit 6[4]). Plaintiffs, and the 70,000 members of the plaintiff class, submit that they are entitled to their share of the proceeds from the tobacco settlement because the State brought, settled and released their claims for past and future medical expenses against liable third parties – the tobacco defendants.

Against the backdrop of the Tobacco Litigation is the statutory framework pursuant to which public assistant [sic] recipients make their claim of right. These statutes

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[3] The jurors were so instructed by the judge at the conclusion of trial: "The term 'damages' means a sum of money that will fairly compensate the State of Minnesota and Blue Cross and Blue Shield of Minnesota for their payment of health-care costs caused by smoking." Appendix 9 to the State's Memorandum of Law at p. 15659, lines 7-10.

[4] "Exhibit ___" references the numbered Exhibits attached to the Affidavit of Robert K. Shelquist submitted in support of Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment, filed with the Court on August 19, 1998.

unequivocally state that upon receipt of medical treatment paid for by the State, all causes of action that the injured recipient might have against liable third parties is automatically conveyed, in part, to the State resulting in what the State itself has described as joint ownership. In essence, the State and the recipient become much like joint tenants of real property. They have shared interests in legal rights. For this reason, the public assistance statutes explicitly authorize the State, at its option, to bring a direct action in its own name against liable third parties to recover its public assistance cost, while protecting the injured recipients by allowing them to share in any recovery resulting from the State's pursuit of those jointly owned claims.

When the plaintiff and class members were treated for smoking-related illnesses between 1978 to 1996, certain causes of action against the tobacco defendants arose in their favor – claims jointly owned with the State to protect the State's subrogation and lien interests by virtue of the Medical Assistance and General Assistance statutes. Damages for past and future costs arising out of those claims have now been brought, settled, and forever compromised resulting in a windfall to the State. The plaintiffs and class members who have paid and continue to pay cigarette taxes, have received nothing.

Fortunately, this harsh result was anticipated by the Legislature and mitigated by the public assistance statutes. Both the Medical Assistance and General Assistance statutes contain specific distribution formulae for allocating the proceedings of a judgment, award or settlement of all or any part of a jointly-owned cause of action between the State and the recipient. The formulae represent the

Legislature's attempt to balance competing public interests of compensating the State for medical costs advanced, with compensating the public assistance recipient who has been injured by the acts of a third party. In short, reasonable costs of collection, including attorneys fees are deducted first, followed by a deduction of the full amount of medical costs paid on behalf of the recipient. The rest of the money, the statutes command, must be paid to the recipient or other plaintiff (such as the recipient's personal representative, guardian or next of kin). In no event, however, can the public assistance recipient recover less than one-third of the amount of the net recovery after deduction of attorneys fees and other collection costs. *See* Minn. Stat. §§ 256B.042, subd. 5; 256B.37, subd. 4; and 256D.03, subd. 8(f). Under these distribution formulae, plaintiffs have requested this Court to declare each party's rights, status, legal relations and liabilities.

Assuming that plaintiffs' allegations are true,[5] as this Court must do when considering the merits of a motion under Minn. R. Civ.P. 12.02(e), plaintiffs' Amended Complaint for declaratory relief sets forth legally sufficient claims for relief. For this reason, the State's Motion to Dismiss and for Sanctions should be denied.

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[5] Plaintiffs have proven each of the allegations in their Amended Complaint by way of the affidavit submitted in conjunction with their cross motion for summary judgment.

II. STATEMENT OF FACTS

The State's Medical Assistance program is funded by both state and federal money. As a condition for receiving matching contributions from the federal government, the State is required to obtain an assignment from each Medical Assistance recipient as to any rights he or she may have against third parties responsible for causing the illness necessitating the medical care. *See* 42 U.S.C. § 1396k and 42 C.F.R. § 435.610. The Minnesota Legislature satisfied this mandate by enacting

* * *

the Tobacco Litigation was based upon and arose out of the public *recipients'* causes of action in whole or in part – It did, the settlement did, and the recovery did.

4. "Nothing in the settlement in any way affects the claims of individual smokers, be they public assistance recipients or otherwise"

False as to the recipients, but true as to members of the general smoking public. The State settled and released the past and future medical expense claims of all public assistance recipients with whom it shared causes of action against the third party tobacco defendants. It is, therefore, quite obvious that the settlement adversely impacted the individual claims of public assistance smokers.

The State did not share the ownership of third party causes of action held by members of the general smoking public, as no subrogation or lien interests were created by the public assistance statutes. Accordingly, smokers

within the general population are not adversely impacted by the tobacco settlement, and nothing in the settlement would affect their individual claims. Smoking members of the general public with private health insurance, as opposed to Medical or General Assistance, are better-off than public assistance recipients with respect to the tobacco settlement for another reason as well. In 1995, the Minnesota Legislature enacted a law limiting the ability of private health insurance plans to seek subrogation for the costs of care provided to their insureds. The statute requires health insurance plans to provide an exercise of subrogation rights only after the injured insured has been made [sic] a full recovery from another source. Minn. Stat. § 62A.095, subd. 2 (1996).

Throughout the Tobacco Litigation, the State was challenged to explain the role that these plaintiffs and class members would play. Both the State and the Tobacco Litigation trial court recognized, at the very least, that the plaintiffs and class members were a necessary link in the causal

* * *

State's selective citation to the Settlement Agreement, deceptive rhetoric, and bluster is an attempt to disguise who is attempting to "grab" whose "dollars." The Attorney General hopes to discount and obliterate the rights of the State's most needy citizens after using their injuries and claims to attack "Big Tobacco". This lawsuit is aimed at correcting that wrong – by establishing the legal rights of 70,000 low-income Minnesotans who have yet again become casualties in the State of Minnesota's historic war against Big Tobacco.

Based upon the arguments set forth above, the State's Motion to Dismiss and For Sanctions should be denied.

Dated: September 4, 1998

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No. C6-00-587

State of Minnesota

In Supreme Court

Jesse Lee Brown, et al. v. State of Minnesota

PETITION FOR REVIEW AND APPENDIX

Date of Filing of Court of Appeals Decision: September 19, 2000

STATEMENT OF LEGAL ISSUES

Can the State institute a self-styled direct action – claiming, settling, and collecting its expenditures on medical/general assistance recipients' injuries, and releasing third parties from all further liability for those damages, without implicating rights and protections of the medical and general assistance statutes?

The District Court dismissed this declaratory judgment action, holding in the affirmative. The Court of Appeals affirmed, holding "the State's lawsuit was outside the scope of these statutes," while simultaneously finding that "any claim the State may have had for these damages was settled."

Does an assistance recipient automatically assign to the State her cause of action as held by the Court of Appeals, or only her right to payment for State-paid benefits as argued by the State and decided by the Court in *Martin v. City of Rochester,* 615 N.W.2d 867 (Minn. App. 2000) (Pet. for Rev. pending)?

The District Court never reached the issue dismissing the Amended Complaint seeking a declaratory judgment for failure to state a claim. Affirming, the Court of Appeals concludes that the recipient's cause of action is assigned in total to the State which becomes its sole owner, but fails to consider the recent contrary Martin opinion or inconsistencies with the statutes.

When the State unilaterally brings, settles, and releases damages claims for medical or general assistance recipients' medical expenses, thereby barring injured recipients from ever seeking medical costs as part of their causes of action against liable third parties, are the statutory allocation formulae contained in Minn. Stat. § 256B.042, subd. 5, 256B.37, subd. 4, and 256D.037, subd. 8(f) applicable to the recovery?

The District Court never directly reached the issue in dismissing for failure to state a claim. The Court of Appeals affirmed, finding that the State solely owns the damages claims, thus the recipients lost nothing, and the formulae only protect recipients who prosecute their own actions.

Can the State unilaterally bring, settle, and/or release all claims for recipients' injury-related medical expenditures, without extinguishing its statutory lien and subrogation interests in all injured recipients' remaining causes of action against the same third parties?

The District Court never reached the issue in dismissing the Amended Complaint despite appellants' explicit prayer for declaratory relief. Despite appellate briefing and argument, the Court of Appeals never mentions or resolves this important issue.

STATEMENT OF CRITERIA SUPPORTING REVIEW

This petition is filed on behalf of two named individuals and approximately 70,000 of Minnesota's neediest citizens[1] – all medical or general assistance recipients who the State proved were hopelessly addicted and whose certain medical cost claims were compromised and settled without notice, participation or compensation by the State in its tobacco litigation. Review is sought pursuant to Minn. R. Civ. P. 117 under the criteria of subd. 2(a) and (d). The issues presented are important, of first impression, and require clarification and harmony with decisions where the recipient, and not the State, has prosecuted an action. The issues affect tens of thousands of recipients of medical benefits – both in this case and beyond. The Appeal Court's opinion jeopardizes recipients' rights, the State's obligations, and calls into question the entire statutory framework by extending State authority to extinguish the rights of thousands of its citizens without due process of law. It is also in contradiction to the Appeals Court's most recent opinion in august which sets forth what is automatically assigned to the State and thereafter jointly owned with the recipients.

STATEMENT OF THE CASE

The issues here are of first impression. The State brought its unprecedented "tobacco" lawsuit against

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[1] The medical/general assistance umbrella encompasses a wide array of needy individuals, including aged, blind, disabled, AFDC families and others. *See e.g.*, § 256B.55.

tobacco companies, claiming as monetary damages the monies spent for smoking-related illnesses on medical and general assistance recipients pursuant to Minn. Stat. § 256B and 256D. The State released the tobacco companies from liability for over $6 billion over time – $1.31 billion of which was solely attributable to past MA/GA expenditures it had made on behalf of approximately 70,000 recipients. These plaintiffs[2] and putative class of assistance recipients then sought a declaratory judgment is clarify: (1) whether they are entitled to at least one-third of the $1.31 billion recovery (or approximately $6,000 per recipient) as provided in three statutes; and (2) whether the State's statutory liens and subrogation interests against any remaining personal causes of action have been legally extinguished based on the State's settlement.

Despite having claimed, settled and released these damage claims, the State denied that any rights of the medical/general assistance statutes were even implicated by the settlement. The District Court agreed, dismissed the case without reaching any of the legal issues on which appellants sought declaratory judgment, and sanctioned appellants' law firms for bringing the case. The Court of Appeals reversed the sanctions, but upheld the dismissal on two grounds. First, without recognizing the State's

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[2] The Court of Appeals' opinion does not consider that named Plaintiff Jesse Lee Brown was identified *by the State* as an injured recipient whose damages the State sought. He cooperated and was deposed by tobacco defendants, only to have a portion of his claims settled without any notice, sharing, or satisfaction of liens and subrogation interests the State still possesses for these same costs.

damages claim for MA and GA costs in its tobacco lawsuit (its damages model being comprised of MA and GA costs for these 70,000 recipients), or its settlement of these claims, the Court held that "the State brought a direct action" and that the State's "claims did not implicate the medical-and general-assistance statutes." (A-037). Second, the Court held that, although the settlement agreement releases the tobacco defendants from all liability for past and future medical expenses and extinguishes plaintiffs' rights to seek these damages and share in their recovery, the statutory formula are inapplicable unless the GA or MA recipients recover as the named-plaintiff prosecuting the action. (A-038). Neither the District Court nor Appeals Court addressed whether State lien and subrogation interests survive against appellants' personal causes of action following the State's settlement and release which results in more than full recovery.

ARGUMENT

The Court's holding creates a massive loophole for the State, permitting it to recover medical and general assistance expenditures for recipients' injuries entirely outside the federal or state statutory framework. This loophole eliminates the balance of reciprocal rights and benefits provided by the statutes. The State may now prosecute unilateral lawsuits or negotiate global settlements, without notifying or involving injured citizens, yet settling part of their damages claim and barring them from ever claiming them again – all without compensation under the statutory sharing formulae and without satisfying or extinguishing the State's lien/subrogation rights in the injured recipients' personal lawsuit. This

new legal framework creates a race to the courthouse, raises serious issues of unjust taking, due process and equal protection, and leaves injured welfare recipients vulnerable to the unilateral exercise of State power to settle away their claims without any right or remedy.

The Appeals Court decision mistakenly analyzes the statutory recovery sharing provisions of the MA and GA statutes only in terms of "how" the State prosecuted its actions and not in terms of what the MA and GA recipient assigned as a condition of receiving State-paid medical treatment or what was settled. "How" the State recovers is irrelevant. As to what is assigned, the Appeals Court finds that the recipients assign away their cause of action to seek medical costs and, paradoxically, only regain the cause of action by prosecuting a claim not owned: "In this case, Appellants did not pursue the tobacco defendants and have not lost their causes of action for their own alleged injuries." (A-042).[3] Nothing in the statute supports this court-created policy decision to strip recipients of a portion of their causes of action. *See, e.g.*, Minn. Stat. § 256B.042(5). More importantly, the decision in this case directly contradicts a two-month old

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[3] The Court of Appeals simply asserts that sharing a recovery only with the injured recipient who actively prosecutes third parties as a plaintiff is a "policy decision" that has been made by the Legislature and does not consider the constitutional implications created thereby. (A-042). Nothing in the legislative history suggests this was discussed. Even if the MA or GA recipient needs to be a "plaintiff," the Appeals Court never considers the fact that the plaintiffs *were* putative class members of *two* class actions against tobacco companies pending when the State filed its own lawsuit.

opinion holding that the MA and GA recipients automatically assign only rights *to payment* for medical care. *See Martin v. City of Rochester*, 615 N.W.2d 867, 869 (Minn. App. 2000) (*citing* 42 U.S.C. § 1396k (a)(1)(A) and Minn. Stat. § 256.015).

The Appeals Court further confuses the issue of when the statutory sharing formulae apply in the face of a State's settlement and general release of all claims brought and unbrought. Plaintiffs sought declaratory judgment pursuant to three state statutes which each provide essentially the same formula for distributing *any* recovery of monies from a third party liable for the injuries to "the State," the "medical assistance recipient," and the "plaintiff":

> Upon *any* judgment, award, or *settlement* of a cause of action, or *any part* of it . . . reasonable costs of collection including attorneys fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the State agency. *The rest* must be paid to the *medical assistance recipient* or other plaintiff. The *plaintiff*, however, must receive at *least one-third* of the net recovery after attorneys fees and other collection costs.

Minn. Stat. § 256B.042(5) (emphasis added). This provision must be read in the context of the entire statute. § 256B.042 recognizes that causes of action against third parties "accrue to the person to whom care was furnished" (Subd. 1) and that third parties pursued are, in the first instance, "liable to the person . . . " (Subd. 3). The statutes give the State an automatic lien and subrogation interest on *all* causes of action of any nature owned by the

recipient and permit State reimbursement from recovery under any theory or characterization of damages. The statute also uses the terms "medical assistance recipient" and "plaintiff" in separate sentences. Minn. Stat. § 256B.042(5). The Appeals Court concluded, without discussion, that the cost sharing formula only apply when a recipient is the prosecuting plaintiff.[4] (A-039 – A-042). Yet, if the State recovers the same damages, no sharing formula exists – according to the court's opinion – and the recipient loses her claim and her statutory safety net of Subd. 5 without compensation. Supreme Court direction is required to consider and rectify the inequities and inconsistencies with both federal and state statutes created by the State's argument.

In the final and most glaring oversight, neither the District Court nor Appeals Court acknowledge that plaintiffs' Amended Complaint seeks a declaration that all lien interests and subrogation rights the State has in plaintiffs' remaining causes of action are satisfied, waived, or otherwise extinguished as a matter of law. The State now admits it settled all past and future MA/GA cost claims owned by these recipients, yet the Appeals Court decision nowhere recognizes that these admissions *mandate* a finding in favor of the plaintiffs on their prayer for a declaration of lien satisfaction and waiver. Supreme Court review and oversight is necessary to protect the

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[4] Two other possibilities exist. The Legislature intended that a "medical assistance recipient" always gets one-third of the net. Alternatively, two separate formulae apply – one for all medical assistance recipients and a second that only applies to medical assistance recipients acting as plaintiffs.

interests these 70,000 people have in any future claims they may prosecute against the tobacco defendants and to clarify the laws for all recipients.[5]

In sum, the District Court failed to declare the parties' rights and obligations and the Court of Appeals affirmed in a decision fraught with error and grave social policy implications.

Dated: October 19, 2000

By /s/ Robert K. Shelquist
One of the
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[5] The lien/subrogation provisions of the assistance statutes require notice to the State of a recipient's claims, judgment or settlement, give the State strong enforcement powers against all parties to such a lawsuit, and can be enforced by a wide array of State agencies or service providers. The powers of all these persons and entities to prosecute future tobacco actions now stand in doubt with no judicial resolution or clarification of the State's continuing lien or subrogation interests. *See* § 256B.042 (Subd. 2-4)

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Jesse Lee Brown, and Ronald J. Bergerson, on behalf of themselves and others similarly situated, Plaintiffs, vs. State of Minnesota, Defendant.	Excerpts from TRANSCRIPT OF PROCEEDINGS File No. 98-11152

The above-entitled matter came on for hearing before the Honorable H. Peter Albrecht, Judge of the above Court, at the Brookdale Courthouse, Brooklyn Center, Minnesota, on the 16th day of September, 1998.

* * *

[26] medical expenses, in no event. Now, that's the safety net that's been taken away from them and you can see it in smoking-related litigation with all the comparative fault, the State readily acknowledges in its brief individual claims in smoking cases are rarely successful. They cite a law review article that very thoroughly covers that.

Now, if a claim is brought by one of these 70,000 victims, and let's say they have got 50,000 medical expenses all paid for by the State, and they seek $200,000 in damages but the jury, in its providence, awards only $50,000, then that recipient would be entitled to one-third of that regardless of how the State did it and we think it

was an excellent trial, great result, they have eliminated all future and past medical expense payments for these recipients. That was the safety net that the legislature provided on a reciprocal basis.

THE COURT: Okay. Thanks.

MR. PLUNKETT: Thank you, Your Honor.

THE COURT: Mr. Ciresi, this will have to be the end of it.

MR. CIRESI: Very quickly. Mr. Plunkett, at the end there, I think answered the Court's question. There is no right under the statute to bring a cause of [27] action by the welfare recipients, none. The statutes create a right for the State. What the individuals can do is bring an individual personal injury action. If they did, the statutes provide that the State can come back and get some money, that's what the statute provides, and what they say there is that if the State does that, and there's a settlement or a judgment, then the formula applies. But we don't have that situation here and the reason for that was to provide an additional remedy for the State, not for welfare recipients. So what Mr. Plunkett is arguing, he says, "Well, wait a minute, the State for what it paid. We didn't pay a penny so we have no standing in fact. There's no statute that gives us a right but the State had a better case." I wish he would have been with us four years ago when everybody said we were smoking something but it wasn't a regular cigarette when we brought the cause of action. But now he's saying "Hey, it was a great case, they did a great job. So I tell you what, give us welfare recipients," and I don't mean that in a negative sense at all, but "give us the money that you paid to treat

our illnesses which we didn't pay a penny because we didn't want to bring an individual cause of action unless you want to take a look over in St. Paul because we are bringing an [28] individual cause of action and we are seeking these damages." They are not prevented from bringing a cause of action. They've got one. If they paid some medical expenses, they can put everything in. The State doesn't have a right to a penny and if they tried to recover what the State set out, you know what the tobacco industry would do. That's why you have the settlement agreement wherein the way it is, the tobacco industry would say, "Wait a minute, you can get all your damages that you want, you can't get what the State paid, we've already settled that part, that's done. You never paid a penny for that, you are not entitled to it and no statute created a cause of action for you." That's what we are talking about here, Judge. They have turned this thing completely on its head.

You know, we have said what we think of their cause of action. I'm not going to get into that. But the fact is this is relatively simple. There is no cause of action for them created under these statutes. None. Thank you, Your Honor.

THE COURT: We haven't gotten into the sanctions issue, do either of you want to be able to argue that?

MR. CIRESI: No, we'll rest on our papers, [29] Judge.

MR. MESHBESHER: I was going to discuss it but I'm confident our briefs take care of that issue.

THE COURT: Okay. Thank you. Thank you for being willing to come out here and get out here in the suburbs. It was a last minute assignment change that I got stuck with and I had to move dozens of lawyers out here this week and I appreciate not only getting out here, but getting here as early as you did so I get to the next one by 8:30.

MR. CIRESI: Thank you, Judge.

MR. PLUNKETT: Thank you.

(Whereupon, the proceedings were concluded.)

* * *

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT

JESSE LEE BROWN and
RONALD J. BERGERON,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

vs.

THE STATE OF
MINNESOTA,

Defendant.

Case Type:
Declaratory Judgment

Court File No.: 98-11152

Excerpts from

THE STATE OF MINNESOTA'S REPLY MEMORANDUM IN SUPPORT OF THE STATE'S MOTION TO DISMISS AND FOR SANCTIONS

* * *

in the cigarette case, the State chose to proceed in a direct action, as opposed to utilizing the statutory remedies provided in the Medicaid statutes.[4]

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[4] The frivolity of class counsel's position is further demonstrated by the fact that under a variety of doctrines in Minneosota law a claim for payment of medical costs ultimately rests, by operation of subrogation or statute, with the entity that paid the medical bills. See e.g. the Minnesota collateral source statute, Minn. Stat. § 548.36 (payments made on plaintiff's behalf by a "public program providing medical expenses" that are not subject to an asserted claim of subrogation must be

The personal injury claims of the welfare recipients against the cigarette industry – for pain and suffering and their own economic loss – are unaffected by the State's direct action and, indeed, are currently being prosecuted in a personal injury class action in federal court in St. Paul. The State settled only the State's claims,[5] not the personal injury claims of recipients.

As noted above, even class counsel now concede that the only claim at issue in this class action is one for "past and future medical expenses" paid for by the State. Thus, these class members have alleged no loss in this action. To have standing to bring a claim, a person must have suffered some injury in fact as a result of the alleged actions. *Epland v. Meade Agency Ins.*, 564 N.W.2d 203, 208 (Minn. 1997), *cert. denied* 118 S.Ct. 181 (1997). This "injury-in-fact" is also required before a party can seek a declaratory judgment. *Kennedy v. Carlson*, 544 N.W.2d 1, 3 (Minn. 1996). Since class plaintiffs are not entitled to recover reimbursements for payments they did not even make, they have suffered no injury and have no standing. *See Byrd v. Independent School District No. 194*, 495 N.W.2d

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eliminated from any personal injury award to a plaintiff). *Cf.* Minn. Stat. § 256B.056, subd. 6 ("By signing an application for medical assistance, a person assigns to the department of human services all rights the person may have to medical support or payments for medical expenses from any other person or entity . . . "); Minn. Stat. § 256D.03 (establishing identical requirement for General Assistance.).

[5] Thus, the State would not have a claim out of any recovery by welfare recipeint/smokers in the personal injury class action in St. Paul for Medicaid or General Assistance payments for smoking-related diseases.

226, 231 (Minn.Ct.App. 1993) (construction union lacked standing to seek declaratory judgment that contract is void because it could not show that it would benefit from declaration), *pet. for rev. denied* (Minn. April 20, 1993); *see also Lines v. Ryan*, 272 N.W.2d 896, 903 (Minn. 1978) (where insurance company fully pays losses suffered by insured, it, not the insured, is the real party in interest in action to recover those losses.).

When all is said and done, and class counsel's rhetoric stripped away, their complaint is this: The Medicaid and General Assistance recipients, who could not afford medical treatment, were afforded these benefits by the State. The State paid the medical bills. Now, class counsel demand that the State – which already paid the medical bills – also pay the Medicaid recipients billions of dollars that the State recovered from the cigarette industry for, *inter alia*, the payment of these bills by the State in the first instance. The logic is absurd; the complaint is frivolous. Accordingly, the class action complaint should be dismissed, with sanctions.

Dated: September 11, 1998.

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